UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SFR, INC. d/b/a PARKSIDE CAFÉ

and Case 10-CA-268413

AMBER TAYLOR,
An Individual

Joseph W. Webb, Esq., for the General Counsel.
James T. Sasser, Esq., (Birmingham, Alabama) for the Respondent.
Cynthia Wilkinson and Alicia K. Haynes, Esqs. (Birmingham, Alabama)
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried via Zoom virtual technology on February 3 and 9, 2022. Amber Taylor filed the initial charge on October 30, 2020. The General Counsel issued the complaint on December 10, 2021.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by constructively discharging Charging Party Amber Taylor, Lacey King and Erin Nichols for participating together in Black Lives Matter (BLM) protests against racial discrimination in May 2020 in Birmingham, Alabama. [1]

[1] At hearing, the General Counsel moved to amend the complaint to allege that Lacey King and Erin Nichols engaged in protected concerted activities by raising workplace safety and health concerns in a meeting attended by Michael Dykes and Robert Bagwell on the morning of May 12, 2020. There is no evidence linking their statements on May 12, to any adverse personnel action, including a constructive discharge. On May 12, Michael Dykes told Nichols that if she was afraid she'd be infected at work, she should not come to work. On May 24, Nichols and Dykes had an exchange in which he accused her of lying by telling people he was going to fire her. He also told Nichols, "Nobody is getting fired for not wanting to work," Tr. 228.

Respondent objected to the amendment and I took it under advisement. Without necessarily finding that the amendment is proper, I dismiss any allegation that Nichols and King were discriminated against by anything that occurred at the May 12, 2020, meeting. The initial charge and amended charges and the complaint do not mention the May 12 meeting.

Respondent contends that the activities of the alleged discrimantees were not protected by Section 7 of the Act, that they voluntarily quit their employment and were not constructively discharged. Moreover, Respondent contends that due to revenue losses suffered by it during the COVID-19 pandemic, the Board does not have jurisdiction over it. I conclude that given the particular facts in this record, Taylor, King and Nichols did not engage in protected activity. I also conclude that even if they engaged in protected activity, they were not constructively discharged. However, if the Board or a court were to disagree, I conclude that under the current state of Board law, it retained jurisdiction over Respondent despite the adverse impact of the COVID pandemic on its revenue.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, operated a neighborhood bar in Birmingham, Alabama from 2010 to October 24, 2021. In the calendar year ending on December 31, 2019, Respondent derived gross revenues in excess of $500,000.[2] Respondent admits, and I find, that it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act in 2019. It denies it was such in 2020 or in the year prior to the filing of the charge in this matter (November 1, 2019-October 31, 2020). However, I find that the Board did not lose jurisdiction over Respondent as a result of its reduced revenue during the pandemic.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent began operations in 2010. Michael Dykes has been the principal owner since then. Since 2014, Dykes has owned a 75% interest in SFR; Robert Bagwell has owned 25%. Dykes generally spent several hours at the bar in the evenings when it served customers. Bagwell operated the bar throughout the evening and supervised employees. Bagwell determined employees' work schedules and informed them as to when they were scheduled to work., Tr. 29, 98. Dykes, however, could change employees' work schedules. Dykes also was involved in the discipline and termination of employees.

Sometime between 2010 and 2014, Dykes hired the Charging Party, Amber Taylor, a personal friend, and gave her the title General Manager.[3] Respondent paid Taylor a salary. Among other tasks, She performed the bookkeeping and payroll duties for Respondent. Alleged discriminatee Erin Nichols worked for Respondent for about 7 years. Alleged

[2] I do not see evidence that the General Counsel established that Respondent purchased and received at its facility, goods and materials valued in excess of $5,000 directly from points outside of Alabama.

[3] I ultimately conclude that Respondent did not constructively discharge Taylor. However, Respondent did not establish that she exercised the degree of independent judgment to make her a statutory supervisor, *Oakwood Health Care, Inc.* 348 NLRB 686, 692-94 (2006), *Children's Farm Home,* 324 NLRB 612 (1997).

discriminatee Lacey King worked for Respondent for about 3 years. Both were bartenders or servers.

There were generally about 6 employees other than Taylor, some of whom were part-time. Taylor generally worked in the afternoon and was not at the bar when employees were serving customers. These employees were supervised by Bagwell. It is unclear as to the extent they were also supervised by Dykes.

Although Taylor may have been consulted on hiring, firing and discipline issues, Respondent did not establish that she had any authority other than to recommend personnel actions. She did not direct employees in their work. Also, she rarely saw Dykes, who generally stopped by the bar for an hour or two in the evenings.

In March 2020, Respondent had to shut down due to the COVID-19 pandemic. Prior to that it was open for business from 3:00 p.m. apparently to the wee hours of the morning. Parkside Café was allowed to reopen on about May 12, 2020, with restrictions, including a limit to the number of patrons allowed in the bar, social distancing and disinfection measures.

On May 12, Respondent held a meeting with its employees in anticipation of reopening. During this meeting Erin Nichols and Lacey King raised concerns as to whether Respondent was taking all necessary precautions against COVID. Nichols expressed concern as to whether Respondent was going to effectively limit the number of patrons entering the bar. King expressed similar concerns. Taylor was not present at this meeting..

Robert Bagwell told them that Parkside was following all CDC and health department guidance. Michael Dykes told Nichols that if she was worried about COVID, she should not come to work.

After the murder of George Floyd by a Minneapolis, Minnesota policeman on May 25, 2020, there were protest demonstrations in Birmingham as well as other cities. Erin Nichols and Lacey King attended some of these protests together. King attended some protests without Nichols. Michael Dykes learned that Erin Nichols attended one or more BLM protests.

On May 31, 2020, there was a Black Lives Matter (BLM) protest rally at Linn Park in Birmingham, . Erin Nichols and Lacey King attended this protest rally, but apparently not together. Hours after the rally there was violence and/or vandalism and looting. On June 1, 2020, the City of Birmingham imposed a curfew from 7:00 p.m. to 6:00 a.m. This curfew was lifted on June 8, 2020.[4]

Amber Taylor attended 1 BLM protest following the Floyd murder. She went with her daughter, not with fellow employees. Speakers at this protest did not talk about racial discrimination in the workplace. This was not the gathering that was followed by a riot. There is no evidence that Dykes or Bagwell knew that Taylor had been at a BLM protest.

[4] During the curfew, Parkside was allowed to sell liquor to go.

On May 31, at 8:56 p.m., Michael Dykes texted Amber Taylor asking her if she went to a protest demonstration. In his text to Taylor, Dykes accused Nichols of hypocrisy on account of comments she had made earlier about her fear of getting infected, G.C. Exh. 2.

On June 1, Taylor, Dykes and Robert Bagwell, exchanged Instagram texts. At 7:49 a.m. Dykes texted that "someone might need to stay on guard at parkside tonight! as in armed guard."

Dykes and Taylor then had a heated exchange regarding a confederate statue that was pulled down. Bagwell texted at 9:52 a.m., asking if he was going to have to separate Dykes and Taylor. Dykes responded:

> Yes! Separation her to the curb sick of her fucking mouth.

At 9:55 a.m., Bagwell wrote, "We'll, I'll take my rifle to work tonight so don't worry about the bar." There is no evidence that this comment was a threat against any employee. Instead, it appears to be intended as assurance to Dykes that Parkside would be protected from vandalism and looters.

That this is the likely import of Bagwell's comment, is shown by his other texts, such as, "We hung out till about 1:15 last night, watching the local news to make sure the mob wasn't heading our way." Dykes responded, "Jefferson County curfew until June 9th, thanks to all the protesters! Good job Birmingham good job." Jt. Exh. 3.

Dykes texted Taylor again on June 1, at 2:21 p.m. stating. "having a protest rally during a pandemic was just stupid. I blame everyone that went. We cannot even be open late now. Way to go blue dots of stupidity." Dykes attached a picture of a handgun in a case, stating, "I exercised my rights too." There is no evidence that by attaching the picture of the gun, that Dykes was threatening anyone.

On June 1 at what appears to be 4:11 p.m., Dykes texted Erin Nichols, stating:

> If you are protesting again today you are adding to the problem and prolonging parkside NOT being able to be open normal hours. There should not be protest during a pandemic! Think of everything else that is cancelled! Thanks.

Taylor also testified that on June 1, Dykes sent her an Instagram message stating that he wanted to fire King and Nichols for attending the BLM protests. Dykes denies doing so, Tr. 271. Unlike other Instagram messages from Dykes, there is no such message in this record, Tr. 38-40. As I do not understand why this message is missing from all the messages Taylor preserved, I do not credit her testimony. Such a message is also inconsistent with Dykes 'other messages to Nichols.

On June 2, at what appears to be 1:26 p.m., Dykes texted Erin Nichols as follows.

> Will not be needing you for back bar Friday. And check with the boys but probably don't need you Saturday because we have to close at 7:00 pm curfew! Thanks Birmingham for spreading violence, no justice no peace! Bravo Birmingham.

Jt. Exh. 4.

On June 2, 2020, at 1:27, Dykes sent an Instagram message to Bagwell and Taylor, stating that, "we don't need the back bar open. I already told erin. No peace, No Tips." Jt. Exh. 3.[5]

Taylor, Nichols and King have very different political leanings than does Dykes, who is clearly on the right of the political spectrum.

On June 2, Dykes texted Nichols telling her she would not be needed at work Friday and possibly Saturday since Parkside had to close at 7:00 p.m. Nichols generally worked Friday and Saturdays in a back bar, which did not open until 8:00 p.m. Nichols also worked in the main bar at times. Dykes tried to get another employee to work her shift at the back bar, Tr. 97.

On June 3, Taylor, who it appears had seen Dykes text about separating her to the curb, responded to Dykes' post regarding how a loan to Parkside should be dispersed if Parkside received one on account of the pandemic.

On June 5, at 8:16 a.m. Michael Dykes sent the following text message to Amber Taylor and Robert Bagwell.

> We should go up one or two dollars on everything until June 10. Call it a protest tax because all the idiots that went to the protest are responsible for us not being able to open normal hours. Any employees that went or are still going should resign. Mr. Floyd was a thug, didn't deserve to die but honoring a thug is irresponsible.

Jt. Exh. 3.

Taylor posted this text on an employee group text, where it became accessible to other employees, including Lacey King and Erin Nichols. She was not directed to do so by either Dykes or Bagwell. These group text exchanges were accessible to Robert Bagwell, but not to Michael Dykes, Jt. Exhs. 11 and 12.

Lacey King posted Dykes' message about raising prices by $2 during the curfew on Facebook. She described Dykes as the most hateful person I have ever met in my life., G.C. Exh. 5.[6]

At 10:20 a.m. on June 5, King texted Dykes, stating, "I quit your stupid fucking bar. You Racists (sic) piece if (sic) shit.

[5] The back bar was an outside bar built on a patio.

[6] It appears that just before posting this message on Facebook and informing Dykes that she was quitting, King informed her coworkers, that. "I quit and I'm blasting all of his texts on social media. Love you all but fuck Michael Dykes. This is my two weeks' notice my last day will be Friday the 19th." Jt. Exh. 11.

Taylor texted; "I quit, but I think I got fired."

Bagwell responded, "I'm not firing anybody."

Taylor then posted: " I hate to bust your bubble girls but he's firing us!.

At 9:24 a.m. on June 5, Dykes sent Erin Nichols a text that said, "you were scared two weeks ago of covid but you can go protest???"

At 10:39, after receiving the text from King, Dykes sent Nichols another text asking, "you quit too"? Nichols did not respond. He sent the same inquiry to Amber Taylor a few minutes earlier, Jt. Exh. 2- stipulation # 13, Jt. Exh. 6. Taylor testified she did not receive this text because she had blocked Dykes' account. Later that day, Taylor sent Dykes a photo of her daughter, apparently accidently.

King then sent Dykes a text stating that she was quitting and calling him other derogatory names, including accusing him of being a racist.

Dykes responded to King by texting that, "slander will be met by lawsuits.".

Analysis

The Alleged Discriminatees did not engage in activity that is protected by Section 7 of the Act.[7]

[7] Section 7 of the Act provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* ... (Emphasis added)."

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991) that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.[7]

Assisting other employees affected by the employer's action, falls within the Act's "mutual aid and protection" clause of Section 7, even if the assisting employee is not personally affected, *Butler Medical Transport, LLC,* 365 NLRB No. 112 (2017); *Richboro Community Mental Health Council,* 242 NLRB 1267, 1267-68 (1979); *Delta Health Center,* 310 NLRB 26, 43 (1993).

Employee appeals to third parties and the general public concerning the terms and conditions of their employment is protected by Section 7. *Allied Aviation Service Co. of New Jersey, Inc.,* 248 NLRB 229 (1980).

Nichols and King engaged in concerted activity by attending a BLM protest together. Regardless of whether or not Taylor attended the protest with them, Respondent would violate the Act if it discriminated against her in the mistaken belief that she had engaged in protected concerted activity.[8] In fact, Taylor did not attend any BLM protest with another employee.

However, in the circumstances of the instant case, none of the alleged discriminatees engaged in activity protected by Section 7 of the Act. The lead case on this issue is *Eastex, Inc. v. NLRB,* 437 U.S. 556 (1978). In that case, the Supreme Court held or reaffirmed the proposition that Section 7 protects employees when they engage in otherwise protected concerted activities in support of employees of employers other than their own. The Court also made it clear that Section 7 protection may cover appeals to persons or entities that are not being solicited for support in their capacity as an employer, such as an appeal to a state legislature opposing "Right To Work" legislation, and an appeal to voters to elect representatives favorable to the employees' concerns.

However, Justice Powell, in the majority opinion also wrote, "It is true, of course, that some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause."

BLM was at least originally a protest movement against police misconduct of African-Americans.[9] It may well have morphed into a protest movement against all forms of racial injustice, including in the workplace. Nevertheless, that is not BLM's primary focus. At the BLM protest attended by Taylor, not a word was said about racial discrimination in the workplace. The protest appears to have been focused entirely on mistreatment of African-Americans by the police and specifically the George Floyd murder.

There is no connection between the BLM protests in this case and any concerns about racial injustice at Parkside Cafe or any other particular employer. In this record, there is no evidence that the BLM protests focused on any specific workplace issue festering in workplaces generally, e.g. racial discrimination in hiring. To find that the Act protects activity which by no stretch of the imagination can be related to the workplace, is to expand the scope of the Act far beyond that to which it has ever been applied before. Moreover, I doubt it was intended to reach such activity, see *Firestone Steel Products, Co.,* 244 NLRB 826 (1979) affd. 645 F2d. 1151 (D.C. Cir. 1981); *Ford Motor Company,* 221 NLRB, 663, 666 (1975) .

Sympathy strikes are also protected by the Act unless prohibited by a collective bargaining agreement.

[8] *Henning and Cheadle,* 212 NLRB 776, 778 (1974) enfd. 522 F.2d 1050 (7th Cir. 1975)

[9] The General Counsel states in its brief that BLM started after George Zimmerman, who was not a policeman, killed Trayvon Martin in about 2013.

The consequences of such an expansion of the scope of the Act would logically forbid employers for prohibiting all sorts of divisive activity from their workplaces, which are at best tangentially related to the concerns of employees as employees.

I find that the attendance of Taylor, King and Nichols at BLM rallies, at least in the circumstances established in this record, is so attenuated to the interests of the alleged discriminatees as employees to fall outside of the "mutual aid or protection clause. Thus, even if they were constructively discharged, Respondent did not violate the Act by doing so.

Assuming that they engaged in protected activity, the Alleged Discriminatees were not constructively discharged

Board law on constructive discharge is summarized in footnotes 3, 4, 6, 7 and 9 of its decision in *Intercon 1 (Zercon)* 333 NLRB 223 (2001). Constructive discharges may be found pursuant to 2 legal theories: the traditional constructive discharge theory and the "Hobson's Choice" theory. The General Counsel has not proven a constructive discharge under either theory.

Under the National Labor Relations Act, a traditional constructive discharge occurs when an employee quits because his employer has deliberately made the working conditions unbearable and it is proven that (1) the burden imposed on the employee caused, and was intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union or other protected activities. *Grocers Supply Co*., 294 NLRB 438, 439 (1989); and *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976).

Under the Hobson's Choice theory, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Hoerner Waldorf Corp.,* 227 NLRB 612, 613 (1976). "To condition employment upon the abandonment by the employees of the rights guaranteed them by the Act is equivalent to discharging them outright for union activities." *Atlas Mills, Inc*., 3 NLRB 10, 17 (1937).

To establish a Hobson's Choice constructive discharge, the choice "must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his part." *ComGeneral Corp.,* 251 NLRB 653, 657–658 (1980), enfd. 684 F.2d 367 (6th Cir. 1982). That choice is one between forgoing the employee's protected activity or being discharged. The alleged discriminatees in this case were not presented with such an unequivocal choice.

While Dykes expressed his displeasure towards BLM and his employees' participation, he made no demand or suggestion that they could no longer work at Parkside if they continued to attend BLM protests.

Moreover, Dykes' comments fall within the purview of Section 8(c) of the Act, which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit.

The second thing to note is that Robert Bagwell, who normally set employee work schedules and supervised them, never conditioned continued employment on ceasing support for Black Lives Matter. In fact, in the three way text exchanges between Bagwell, Dykes and Taylor, Bagwell wrote that he was not firing anybody. Given this situation, which was ambiguous at best, I find that the discriminatees were not given a clear and unequivocal choice between continued employment and continued support for Black Lives Matter.

The Board continued to have jurisdiction over Respondent in 2020 and 2021.

The General Counsel's reliance on the calendar year prior to the alleged violations appears to be consistent with the Board's past practices, *Reliable Roofing Co., Inc.,* 246 NLRB 716 n. 1 (1979). It is undisputed that in calendar year 2019 Respondent met the Board's jurisdictional standard of $500,000 gross volume of business. Moreover, under normal conditions, such as those that existed prior to March 2020, Respondent appears to have met the Board's jurisdictional standards.

In the past the Board has held that a temporary loss of business does not warrant refusal to assert jurisdiction where, as here, it is adequately demonstrated that the Employer's normal business operations satisfy the present jurisdictional standards, *Silvers Sportwear,* 108 NLRB 588 (1954). Whether the Board determines to treat losses due to COVID-19 differently is up to the Board to determine.[10]

Conclusion of Law

Respondent did not constructively discharge Amber Taylor, Lacey King and Eric Nichols for engaging in protected concerted activity.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

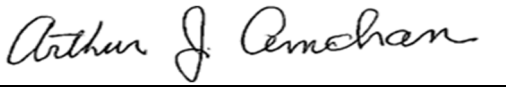
[10] Given my disposition of this case, I need not decide whether the General Counsel established jurisdiction without proving that Respondent purchased and received at its facility, goods and materials valued in excess of $5,000 directly from points outside of Alabama. It could be that given Respondent's answer, admitting that it was an employer engaged in commerce, that the General Counsel did not need to do so, see *Anchortank, Inc.*233 NLRB 295 n. 1 (1977). The General Counsel submits that since Respondent did not specifically deny paragraph 2(c) of the complaint, the allegations therein regarding the $5,000 threshold are admitted. The Answer in this regard appears to be the result of a typographical error.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 21, 2022



Arthur J. Amchan
Administrative Law Judge